[SPECIAL JURISDICTION]

CUSSEN, J.

JUNE 23, 1939.

IN RE HAJI MANSUR BIN DUSEH ALIAS MATSO BIN DUSEH DECD.

[REFERENCE REGISTRY N.S. No. 101 of 1939]

[TAMPIN DISTRIBUTION SUIT No. 11 of 1938]

Customary Tenure Enactment, Ss. 4, 25; Probate and Administration Enactment, Ss. 184 (iii), 188; Distribution Enactment; S. 2—Customary land—distribution—reference by Collector to Court for decision on a point of law.

The effect of the Customary Tenure Enactment, in the case of **customary land** as defined, is to replace in whole or in part the unwritten law of custom by the written law of the Enactment.

As regards land, in respect of which mukim registers have not been endorsed, it is open to the Collector to hold an inquiry under Section 4 of the Enactment and to decide whether or not land is occupied subject to the custom; his recorded decision is the only conclusive evidence that the land is or is not occupied according to the custom.

There is nothing in Section 25 of the Enactment which precludes the Collector from holding an enquiry or from making an endorsement under the Enactment in the case of land of which the registered owner is dead and in respect of which the mukim register does not bear an endorsement.

Cases referred to:—

(1) *Green v. Reg.*, (1878) A.C. 513.

(2) *Kutai bin Haji Lateh & Others v. Taensah binti Haji Enoh*, 3 M.L.J. 251; (1933–1934) F.M.S.L.R. 304.

REFERENCE TO COURT under Section 188 of the Probate and Administration Enactment.

Cussen, J.—This is a case stated for the decision and directions of the Court under section 188 of the Probate and Administration Enactment arising in Tampin Distribution Suit No. 11 of 1938.

Section 188 of the Probate and Administration Enactment reads:—

> "If any difficult point of law or custom arises in the course of any proceedings under this Chapter the Collector may state a case for the decision and direction of the Court."

The case is set out in the following memorandum of the Collector:—

> "The claimants to the property left by the deceased Haji Mansur may be divided into three groups:
>
> (a) His sisters, Pamah and Minah;
> (b) His children by two wives, which were divorced some time prior to his marriage, Nomi, Haji Pilus, Bayang, Amat and Konit;
> (c) His widow, Simban, and his youngest son, Hussin.
>
> "2. Of the five pieces of land left Simban claims two E.M.R. 2752 and 2754, Gemencheh, as Charian laki bini. This is a good claim according to the Custom and is supported or partially supported by provisions of the Muhammadan Law. None of the other parties make a claim to these two lots. The remaining three are claimed by the sisters under the Custom; under Muhammadan Law any claim from them would be barred by the existence of the wife and children of the deceased.
>
> These lots are also claimed by the children of the deceased's previous marriage. This claim is under the Muhammadan Law, and would be barred under the Custom. Under the Custom, when there is a divorce, there is a settlement of claims between the two parties: and after the divorce neither the wife nor her children have a further claim on the husband's property.
>
> Finally the widow also sets up a claim to the three lots on behalf of herself and her child. Her claim can be based on either the Custom or Muhammadan Law: but has in either case to be weighed with the other claims. It is agreed that all parties are members of Customary tribes.
>
> 3. It is important, therefore, to decide whether or not the distribution of this estate should be effected according to the Custom or according to Muhammadan Law.
>
> This Mukim, Gemencheh, is part of the Luak of the Undang of Johol, which together with the other luak of the districts of Tampin, Kuala Pilah and Jelebu form the Customary districts of Negri Sembilan i.e. the Customary Tenure Enactment (Cap. 215), is applied to these districts: and unquestionably in the past all matters of succession to land were regulated according to the Custom: and that this Custom had the effect of law. I would refer to the explanation of the Rembau Custom contained in 'Rembau' by C. W. C. Parr and W. H. Mackray, Journal of the Straits Branch of the Royal Asiatic Society No. 56, and to 'The Customary Law of Rembau' by E. N. Taylor, Journal Volume VII part I, Malayan Branch of the Royal Asiatic Society. These, of course, only refer to the Custom as followed in the luak of Rembau, but the Custom as it was followed here was similar to the Rembau Custom in principle with only differences of detail.
>
> 4. I have recorded briefly a statement on page 4 from the Penghulu, the head Customary official of Gemencheh, a statement as to the partial change over to the Muhammadan Law: but I have not thought it necessary to call numerous witnesses to the acknowledged fact that in the past and until relatively recently in Gemencheh as well as Rembau and other Customary districts all questions of inheritance were decided according to the Custom. The Custom was, in fact, followed for many years after the Constitution of the State of Negri Sembilan.
>
> 5. There are also two judgments of the Supreme Court that the personal law of Malays in Customary districts is the Custom **vide**:
>
> (i) Mr. Justice Acton, quoted on page 65 of **Taylor's** Rembau;
> (ii) Mr. Justice Burton—Civil Appeal 21 of 1928.
>
> 6. There are, however, a series of judgments of the Supreme Court, dating from 1934, to the effect that the distribution of the property of Malays in Customary districts should follow the Muhammadan Law, except when land is concerned the title of which is endorsed 'Customary'. They are:
>
> (i) Mr. Justice Mudie—Seremban Civil Appeal 11 of 1934 **Kutai bin Haji Lateh & Others, v. Taensah binti Haji Enoh**(2).

(ii) Mr. Justice Pedlow—Civil Appeal 25 of 1936 and 5 of 1937;

(iii) Mr. Justice Raja Musa—Civil Appeal 1 of 1938.

The ground for all these decisions is, I think, contained in the following paragraph of Mr. Justice Mudie's judgment:

> 'This is not Customary Land. It has not been endorsed under section 4 of the Customary Tenure Enactment, 1926, or under section 2 of the Customary Tenure Enactment, 1909. Whether non-customary land acquired by parents from their joint earnings would descend according to the **Adat** or the **Hukum Shara** was never definitely settled until the passing of the Customary Tenure (Amendment) Enactment, 1930, which amends the principal Enactment by the addition of a new section 25, which provides:
>
> > 'Nothing in this Enactment contained shall affect the distribution of the Estate, not being customary estate, of any deceased person.
> >
> > 'It is clear, therefore, that this land is governed by the **Hukum Shara.**'
>
> 7. With respect I would submit that this new section 25 does not give decision as to whether the estate, not being customary estate, of any deceased person, shall be distributed according to the **Hukum Shara** or **Adat Perpateh**: it only lays down that the complicated procedure of the Customary Tenure Enactment should not be followed with respect to such estates.
>
> 8. I would also urge that so momentous a change as the change from **Adat Perpateh** to the **Hukum Shara** could only be effected by direct legislation: and that such legislation should state clearly and unequivocally that the **Adat Perpateh** was being replaced by **Hukum Shara.** As far as I am aware there has been no such legislation.
>
> 9. I, therefore, ask for the directions of the Supreme Court as to whether I shall follow the Custom (Adat) or Muhammadan Law (Hukum Shara) in distributing this estate."

Under section 184 (iii) of the Probate and Administration Enactment the Collector shall distribute the estate "according to the law or custom having the force of law applicable to the deceased."

Section 173 (f) refers to "Rules of Muhammadan law as varied by local custom in respect of the distribution of . . . . the estate of a deceased person."

Section 2 of the Distribution Enactment reads:—

> "Nothing in this Enactment shall apply to the estate of any person professing the Muhammadan religion or shall affect any rules of Muhammadan law as varied by local custom in respect of the distribution of the estate of any such person."

It is clear then that the distribution is to be governed either by the law *i.e.* Muhammadan law or custom having the force of law *i.e.* unwritten law, or by some combination of the two. There has been, and is still, beyond any doubt, a body of unwritten law, that is customary law known as *Adat,* in existence in certain parts of Negri Sembilan. Such *adat* or customary law provides rules for the distribution of land of deceased persons belonging to the tribes of Malays amongst whom that custom exists as law. Such a body of unwritten law, that is customary law, must be presumed to continue to exist until the contrary is established. Such unwritten law may be destroyed in whole or in part by legislation which must be express or be by necessary implication. Except where it is shown that such *adat* or unwritten law has been so repealed, that law must be given effect to within the sphere of its operation. Part of such customary law referred to land, and the question which is raised in this reference is as to whether or not that customary law has been repealed, or its sphere of operation limited by the provisions of the Customary Tenure Enactment. It is necessary therefore to consider and construe the provisions of this Enactment.

Lands in the districts of Kuala Pilah, Tampin and Jelebu occupied by Malays who are members of certain tribes set out in Schedule B. may or may not be occupied subject to the "custom".

"Custom" is defined as meaning "the customary land law of Malays resident in the districts of Kuala Pilah, Tampin and Jelebu who are members of the scheduled tribes."

The Enactment provides a procedure for determining whether or not such lands when held under entry in the mukim registers are or not occupied subject to the "custom"—section 4 (i).

If the Collector finds that the land is occupied subject to the custom *and* if it is registered in the name of a female member of one of the said tribes, then he adds the words "Customary Land" to the entry in the mukim register, and such endorsement is conclusive proof that the land is occupied subject to the custom.

It is to be noted that no provision is made for the case where the land is occupied subject to the custom but not registered in the name of a female. It would, in the language of the section, seem open to the Collector to find that the land was occupied subject to the "custom" although registered in the name of a male.

The section also provides that if the Collector is not satisfied that such land is occupied subject to the custom he shall record his decision which, subject to appeal, is conclusive proof that the land is not occupied subject to the "custom".

This means, I think, that even where the land is registered in the name of a male the Collector may still hold an inquiry and determine whether or not it is occupied subject to the "custom".

Provision is also made for endorsement of the words "Customary Land" in the case of fresh alienation to female members of the tribes.

In the first Customary Tenure Enactment—"The Customary Tenure Enactment, 1909"—it was provided in section 2 that in the case of lands entered in the Mukim Registers of the said districts "it shall be lawful for the Collector, if he shall be satisfied that such land is occupied subject to the custom to add to the entry in the Mukim Register the words 'Customary Land' which is conclusive proof that the land is occupied subject to the custom".

The section also provided (by a 1919 amendment) for such endorsement with like effect to be made in the case of fresh alienation of lands without any restrictions (expressed) as to the sex of the persons registered as owners.

This section 2 of the 1909 Enactment is to be distinguished from the present section 4 in that (a) it does not make the sex of the registered owner a factor governing the endorsement and (b) it makes no provision for the case where the Collector is not satisfied that the land is occupied subject to the custom. If he is satisfied it is lawful for him to endorse but, if he is not so satisfied, that is not conclusive of the question whether or not the land is subject to the custom.

So much is necessary to be stated and kept in mind when we consider the definition in the Enactment of "Customary Land".

By section 2:—

> " 'Customary Land' shall mean land held by any entry in the mukim register which has been endorsed under the provisions of sub-sections (i) and (ii) of section 4 of this Enactment or under section 2 of 'The Customary Tenure Enactment, 1909'."

It therefore means only land in respect of which the endorsement "Customary Land" has been made in the mukim register.

Is it a valid conclusion to hold that no land is to be considered as occupied subject to the custom (which is described in the 1909 Enactment as a tribal custom) unless the title for such land is so endorsed?

In the case of the "1909" Enactment the endorsement is only evidence that the land is occupied subject to the custom; there is, on a proper construction of the Enactment, no ground for holding that land in respect of which no endorsement has been made is not occupied subject to the custom.

Endorsement under section 4 (i) of the present Enactment does not provide for the case where the Collector is satisfied that the land is occupied subject to the "custom" but is registered in the name of a male.

The fact then that the entry in the mukim register relating to any land does not bear the endorsement "Customary Land" does not prove that the land is not occupied subject to the custom.

On the contrary it is the recorded decision (after inquiry under section 4 (i) that the Collector is not satisfied that the land is occupied subject to the custom which affords conclusive proof that it is not.

There is no ground for any such proposition that only land in the name of a female can be held subject to the custom. There is nothing in section 4 on which to found it and the provisions of section 3 plainly indicate the contrary *i.e.* that land may be registered in the name of a male and still be subject to the custom.

The original 1909 Enactment was entitled "An Enactment to provide for the preservation of Customary Rights over certain lands". The Preamble reads as follows:—

> "WHEREAS certain lands in the administrative districts of Kuala Pilah and Tampin have been and are lawfully occupied by the members of certain tribes enumerated in the schedule in accordance with their tribal custom, which is hereinafter referred to as 'the custom':
>
> AND WHEREAS it is expedient that particulars of the said lands be entered in the mukim registers of the said districts in accordance with the provisions of Part III of 'The Land Enactment, 1903', but so that nothing in such entries shall impede the due observance of the custom:
>
> AND WHEREAS particulars of certain of the said lands have already been entered in the said mukim registers:
>
> It is hereby enacted by His Highness the Yang di Pertuan and Chiefs in Council as follows:...."

It is clear from this that the object of this Enactment was not to create or declare the Customary Rights but to protect them from the danger arising from the application of the system of Land Registration—title by entry in the mukim register—to these lands. The obvious danger was the destruction of particular rights by reason of transactions with third parties acting in good faith on the register.

The present Enactment appears to contain far more substantive law as regards what the "custom" is,

though there is nothing from which to conclude that even this latest legislation is to be construed as being in its contents exhaustive of the "custom"—as being in any way a complete code of what the customary land law is in substance.

In so far as it does it may be taken as the embodiment in written law of the unwritten customary law. To that extent the customary law is replaced by the Enactment.

But a living body of customary law cannot be destroyed by a written law except by express declaration or by necessary implication.

> "There is no doubt that, as a general rule, customs or rights of a similar description are not to be taken away by inference or without distinct words."

(*Green v. Reg.*[1]). The analogy from English law of the effect of a Statute on the Common Law is, I think, applicable, and there is clear authority that a Statute does not override or displace the Common Law except by express declaration or necessary implication.

The effect of the Customary Tenure Enactment, reviewed and examined by these accepted canons of construction, is, in my opinion, to, in the case of "Customary Land" as defined, replace in whole or in part the unwritten law of custom by the written law of the Enactment; but this only applies to "Customary Land". For such land, the old customary rights are replaced by Statutory rights to whatever extent this Enactment can be held, on a true construction, to contain such rights. I express no opinion as to whether in respect of such "Customary Land" the Enactment should be held to be exhaustive of such rights.

But as regards land subject to the custom in respect of which mukim registers have not been endorsed, the customary law still applies and should be given effect to.

Until the judgment of Mudie J., in Negri Sembilan Civil Suit No. 11 of 1934[2], it appears that effect was given to the *adat* or custom in matters relating to the distribution of land following on the decisions of Acton J., in Negri Sembilan Petition for Letters of Administration No. 106 of 1926, and Burton J., in Civil Appeal No. 21 of 1928.

In the latter case the learned Judge considered very fully the nature and position of *adat* or customary law among the people subject to it.

The decision of Mudie J. has been followed by Pedlow J. and by Raja Musa J., and that decision of Mudie J. is based upon an interpretation of section 25 of the Customary Tenure Enactment which reads:—

> "'Nothing in this Enactment contained shall affect the distribution of the estate, not being customary estate, of any deceased person.' It is clear, therefore, that this land is governed by the **Hukum Shara.**"

With respect I disagree with the conclusion the learned Judge arrived at based upon this negative provision in the Enactment.

Section 25 means exactly what it says and nothing more. I do not think that the positive proposition by the learned Judge based upon that section is validly derived. I may point out that even if valid, this conclusion could only extend to land in the Customary Tenure Districts (Kuala Pilah, Tampin, Jelebu) held by members of the Scheduled Tribes, as the conclusion is based upon section 25 of the Customary Tenure Enactment. It is not, as so derived, a valid conclusion as regards other land. And it may be pointed out that a substantial part of Negri Sembilan lies outside the Customary Tenure Districts.

To give an example of one result which would follow from this interpretation: it would appear that whereas in the lifetime of the registered owner of a piece of land in the mukim registers of the districts of Kuala Pilah, Jelebu and Tampin the Collector may enquire under section 4 of the Enactment and decide that the land in question is subject to the custom and, if the registered owner is a female of one of the scheduled tribes, endorse on the register the words "Customary Land", thereby deciding the law governing the distribution of such land: if such registered owner died the Collector would be precluded by section 25 from any inquiry and from making any such endorsement and the distribution of the land would be not according to the custom but according to the *Hukum Shara* (Muhammadan Law). Such result seems a very artificial one.

In my opinion, therefore, section 25 has not the effect attributed to it and does not confine the operation of customary law as has been held in the judgments referred to and therefore I am of opinion that distribution of the land in question should proceed according to the custom so far as the custom provides for such distribution.

This conclusion I have arrived at, like that of Mudie J. (*supra*), proceeds upon the interpretation and construction of the Customary Tenure Enactment.

I have not overlooked the provisions of section 23 of that Enactment which reads as follows:—

> "If doubt shall arise as to the mode of operation of this Enactment or the manner in which the provisions thereof are to be construed or carried into effect or otherwise in relation thereto, the same may be referred through the Resident to the State Council who shall decide the same and such decision shall be final and shall not be questioned or revised by any Court."

That gives the State Council an entirely arbitrary and unrestricted power to interpret this Enactment. Such interpretation is in reality amendment of the Enactment. It must, of course, be given effect to as legislation but its meaning and effect are to be interpreted in the Courts according to the established rules of construction.

Order accordingly.

[APPELLATE CRIMINAL JURISDICTION]

POYSER, C.J.

October 17, 1939.

KUAN CHOON HIN v. PUBLIC PROSECUTOR.

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 51 of 1939]

Penal Code, S. 304A—causing death by a rash act —high degree of negligence—necessity of proof of.

The appellant was driving his car on the main road into Klang. When approaching the junction of the main road and the road leading to the Klang Amusement Park, a Chinese boy ran diagonally across the main road. The appellant who was at that time on the left side of the road, swerved to avoid him but failed to do so, and knocked the boy down, at the edge of the grass on the right hand side of the road. The appellant was unable to stop his car at the spot where he knocked the boy down, and about eight or ten yards further on knocked down the boy's father who was wheeling a bicycle, on the edge of the right hand side of the road. The appellant was also unable to stop his car after the second accident until he had proceeded about 15 or 20 yards, and he finally pulled his car up on the left hand side of the road. Both the boy and his father died the same day from the injuries they had received.

Held, that the evidence proved that high degree of negligence it is necessary to prove before an accused person can properly be convicted under Section 304A of the Penal Code.

Cases referred to:—

(1) *Andrews v. Director of Public Prosecutions,* (1937) A.C. 576.

(2) *Cheow Keok v. Public Prosecutor,* 9 M.L.J. 103.

MAGISTRATE'S CRIMINAL APPEAL.

Hastings for the Appellant.

Grattan-Bellew, Deputy Public Prosecutor, for the Public Prosecutor.

Poyser, C.J.—The appellant was convicted on two charges under section 304A of the Penal Code. On the first charge he was sentenced to a fine of $500/- or in default 3 months R.I., on the second charge to 3 months R.I. His driving licence was also suspended for one year.

There was very little dispute as to the facts, and the only question that arose on appeal was, whether the evidence proved that high degree of negligence it is necessary to prove before an accused person can properly be convicted—under the above section.

The facts briefly are as follows. The appellant was driving his car, an Austin 12 Saloon, on the main road into Klang; when approaching the junction of the main road and the road leading to the Klang Amusement Park, a Chinese boy ran diagonally across the main road. The appellant who was at that time on the left side of the road, swerved to avoid him, but failed to do so, and knocked the boy down, at the edge of the grass on the right hand side of the board.

The appellant was unable to stop his car at the spot where he knocked the boy down, and about eight or ten yards further on knocked down the boy's father who was wheeling a bicycle, on the edge of the right hand side of the road. The appellant was also unable to stop his car after this second accident until he had proceeded about 15 or 20 yards, and he finally pulled his car up on the left hand side of the road. Both the boy and his father died the same day from the injuries they received.

Mr. Hastings, who appeared for the appellant, conceded that the appellant was guilty of a grievous error of judgment, but urged that the conviction could not be supported having regard to the case of *Chow Keok v. Public Prosecutor,*(2) a recent decision of the F.M.S. Court of Appeal, which decided that to establish a charge under section 304A of the Penal Code, it was necessary to prove the same high degree of negligence that must be proved, before an accused person can properly be convicted in England on an indictment for manslaughter by negligence.

In my opinion the evidence did establish that high degree of negligence. There appears to be no doubt that the appellant was driving at a grossly excessive speed, having regard to the fact that he was travelling along a road which, according to the police evidence, was usually crowded. The excessive speed at which the appellant was driving was clearly proved by the